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In the Supreme Court of the United States

OCTOBER TERM, 1995

STACEY C. KOON, PETITIONER

v.

UNITED STATES OF AMERICA

LAURENCE M. POWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in reviewing the district court's determination that several factors formed a valid basis for a departure from the sentencing range applicable to petitioners under the Sentencing Guidelines, the court of appeals correctly applied a de novo standard of review and correctly concluded as a matter of law that the district court in this case departed downward on the basis of invalid factors.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-79a)[1] is reported at 34 F.3d 1416. The court of appeals' denial of the petition for rehearing and suggestions of rehearing en banc (Pet. App. 80a-93a) is reported at 45 F.3d 1303. The sentencing opinion of the district court (Pet. App. 94a-138a) is reported at 833 F. Supp. 769.

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[1] References to "Pet. App." are to the appendix to the petition in No. 94-1664.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1994. The petitions for rehearing were denied on January 12, 1995. Pet. App. 80a-81a. The petition for a writ of certiorari in No. 94-1664 was filed on April 10, 1995. The petition for a writ of certiorari in No. 94-8842 was filed on April 12, 1995. The Court granted both petitions on September 27, 1995. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 3553(a) and (b) and 18 U.S.C. 3742(a)-(f) are reprinted in the appendix to this brief (App., *infra*, 1a-5a).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner Powell was convicted of willfully using unreasonable force during the arrest of Rodney King, in violation of 18 U.S.C. 242. Petitioner Koon was convicted of willfully permitting other police officers to use unreasonable force during King's arrest, in violation of 18 U.S.C. 242. Petitioners were sentenced to 30 months' imprisonment. The court of appeals affirmed the convictions, but vacated the sentences and remanded for resentencing.

1. In the early morning hours of March 3, 1991, Rodney King was driving while intoxicated on a freeway in Los Angeles, California. Officers of the California Highway Patrol (CHP) observed King's car speeding and began to pursue it. When the car left the freeway, the CHP officers radioed for help, and officers of the Los Angeles Police Department (LAPD) joined in the pursuit. The pursuit ended when King pulled his car into an entrance to a recreation area. Petitioner Powell was one

of the LAPD officers who pursued King. Petitioner Koon, an LAPD sergeant, arrived after the pursuit had ended and took command of the scene. Pet. App. 2a.

Officers ordered King and his two passengers to get out of the car and assume a felony prone position, *i.e.*, to lie face down on the ground, with arms and legs spread. King got out of the car, but he did not lie down. Eventually, King got down on his hands and knees but did not assume the felony prone position. Four officers, including Powell, attempted to force King into that position. King resisted and became combative, and the officers retreated. Koon fired two taser darts from an electric stun gun into King. Pet. App. 2a.

The events that followed were captured on a videotape made by George Holliday, which was an exhibit at trial (U.S. Exh. 20). As the videotape begins, it shows King rising from the ground in an attempt to escape. Powell struck King in the head with his baton. Powell and co-defendant Wind continued to strike King with their batons, and King fell to the ground. At 18 seconds on the tape, co-defendant Briseno put his hand on Powell's raised baton. From the 18th to the 30th second on the tape, King attempted to rise, and Powell and Wind again struck King with their batons. King then toppled to the ground. Pet. App. 2a-3a; U.S. Exh. 20.

From the 35th to the 51st second, Powell repeatedly struck King with his baton, as King lay on the ground. At approximately the 43d second, one of the blows fractured King's leg. At the 55th second, Powell struck King on the chest or upper abdomen, and King rolled onto his stomach and lay prone. At that point, the officers stepped back and observed King for approximately ten seconds. Powell began to reach for his handcuffs. Pet. App. 3a; U.S. Exh 20.

At 1:07 on the tape, Briseno stomped on King's upper back or neck. After King writhed reflexively, Powell and Wind hit King with a series of baton blows, and Wind kicked him in the upper thoracic or cervical area six times, until approximately 1:26. At approximately 1:29, King put his hands behind his neck and he was then handcuffed. Pet. App. 3a, 102a.

Powell used his hand-held radio to request an "RA [rescue ambulance]" for the "victim of a * * * *" and Koon yelled the word "beating." In response, Powell laughed and described King's injuries in the radio call as "numerous head wounds." 2/26/93 PM Tr. 17-18; 3/5/93 PM Tr. 62-65; 3/24/93 Tr. 85; Exh. 19. After the arrest, Powell sent messages to another officer over the Mobil Digital Terminal, saying "ooops" and "I havent beaten anyone this bad in a long time." Koon sent a message to the police station stating: "U[nit] just had a big time use of force. . . . Tased and beat the suspect of CHP pursuit big time." Pet. App. 3a.

King was taken to a hospital where he was treated for a fractured leg, multiple facial fractures, and numerous bruises and contusions. At the hospital, Powell said to King: "We played a little ball tonight, didn't we Rodney? * * * You know, we played a little ball, we played a little hardball tonight, we hit quite a few home runs. * * * Yes, we played a little ball and you lost and we won." Pet. App. 3a.

Koon, Powell, Briseno, and Wind were tried in state court in Simi Valley, California, on charges of assault with a deadly weapon and excessive use of force by a police officer. The four officers were acquitted on all charges, except for one count against Powell that resulted in a hung jury. Pet. App. 4a.

Thereafter, petitioners, along with Briseno and Wind, were indicted by a federal grand jury under 18 U.S.C.

242 for violation of King's constitutional rights under color of state law. Powell, Briseno, and Wind were charged with willfully using unreasonable force in arresting King. Koon was charged with willfully permitting the other officers to use unreasonable force during the arrest. The jury convicted petitioners and acquitted Briseno and Wind. Pet. App. 4a.[2]

2. The district court sentenced petitioners under Guidelines § 2H1.4 of the United States Sentencing Commission *Guidelines Manual* (Nov. 1992), which applies to violations of 18 U.S.C. 242. Pet. App. 96a, 108a. Section 2H1.4 prescribes a base offense level that is the greater of ten, or six plus the offense level of the underlying offense. The court found that the underlying offense for both petitioners was aggravated assault, for which Guidelines § 2A2.2(a) prescribes a base offense level of 15. Pet. App. 109a-112a. That led to a base offense level of 21. The court increased that offense level for both petitioners by four levels because a dangerous weapon was used (see Guidelines § 2A2.2(b)(2)(B)), and by two

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[2] At trial, the government contended that all blows after King toppled to the ground at 30 seconds on the videotape violated 18 U.S.C. 242. In rejecting Powell's challenge to the sufficiency of the evidence, the court of appeals determined that the evidence was sufficient to support the government's theory. Pet. App. 55a. At sentencing, however, the district court found that many of the blows after 30 seconds "may have been tortious," but because of King's slight movements and his failure to assume the felony prone position during that period, petitioners did not have the specific intent required for conviction under Section 242 at that point. *Id.* at 104a, 106a-107a. Rather, the district court found, the violation of 18 U.S.C. 242 did not begin until 1:07, after Briseno stomped King. *Id.* at 106a. In affirming that finding, the court of appeals stated that "[a]lthough we may not agree, the district court resolved [the] ambiguities [in the evidence] in favor of the defense," and "the government has not established clear error." *Id.* at 78a-79a.

levels because King had suffered bodily injury as a result of petitioners' unlawful conduct (see Guidelines § 2A2.2(b)(3)(A)). Pet. App. 112a-115a. The adjusted offense level was therefore 27. *Id.* at 115a, 118a. Because neither petitioner had a criminal record, they fell within criminal history category I. The sentencing range for an offense level of 27 and criminal history category I is 70 to 87 months' imprisonment. U.S.S.G. Ch. 5 Pt. A (Sentencing Table).

The district court, however, granted both petitioners a downward departure from the prescribed Guidelines range. It granted a three-level departure based on a combination of factors and a five-level departure based on victim misconduct. The departure yielded an offense level of 19, and a sentencing range of 30 to 37 months' imprisonment. Pet. App. 134a-135a. The court sentenced both petitioners to 30 months' imprisonment. *Id.* at 135a.

a. The district court based the three-level combination departure on (1) the additional punishment resulting from petitioners' job termination proceeding and susceptibility to abuse in prison; (2) the absence of a need to protect the public from further criminal activity by petitioners; and (3) the purported "specter of unfairness" resulting from successive state and federal prosecutions for the same conduct. Pet. App. 120a; see *id.* at 121a, 124a-131a.

With respect to the first factor, the court found that petitioners would face a job-termination proceeding, after which they would lose their positions as police officers, be disqualified from prospective employment in the field of law enforcement, and suffer the anguish and disgrace those deprivations entail. Pet. App. 127a-128a. The court also concluded that, because of the "widespread publicity and emotional outrage which have surrounded

this case," petitioners were "likely to be targets of abuse" in prison. *Id.* at 125a. As for the second factor, the court found that petitioners were not "violent, dangerous, or likely to engage in future criminal conduct," and that there was therefore "no reason to impose a sentence that reflects a need to protect the public from [them]." *Id.* at 129a. Finally, the court stated that successive state and federal prosecutions for the same conduct unfairly burdened petitioners. *Id.* at 130a. In the court's view, while the federal prosecution had not violated petitioners' constitutional rights, it had "raise[d] a specter of unfairness." *Ibid.* The court concluded that, although none of the three factors standing alone would justify a departure (*id.* at 120a), when "taken together," they did. *Id.* at 121a.

The court awarded the five-level downward departure pursuant to Guidelines § 5K2.10 (policy statement), which permits a departure "[i]f the victim's wrongful conduct contributed significantly to provoking the offense behavior." Pet. App. 57a, 121a-124a, 132a. The court acknowledged that, "by the time [petitioners'] conduct crossed the line to unlawfulness, Mr. King was no longer resisting arrest. He posed no objective threat, and the defendants had no reasonable perception of danger." *Id.* at 123a. The court believed that Section 5K2.10 was nonetheless applicable because, but for King's speeding, petitioners would never have been present at the scene, and but for King's initial wrongful conduct in resisting arrest and attempting to escape, no force would have been necessary in the first place, and the incident would not have occurred at all. *Id.* at 122a-123a.

The court also held that, because of the role that King's misconduct had played in the offense, petitioners' conduct did not fall within the "heartland" of offenses contemplated by the guidelines that apply to excessive

force cases. Pet. App. 123a. The court viewed cases in which state officials deliberately use excessive force, without any cause to initiate the use of force, as the heartland of Guidelines § 2H4.1. The court concluded that the Guidelines do not adequately account for the differences between such heartland cases and cases in which an official's use of force is lawful at the outset. Pet. App. 123a-124a.

3. The court of appeals affirmed petitioners' convictions, but vacated their sentences and remanded for resentencing. Pet. App. 1a-79a. The court of appeals reviewed de novo the question whether the district court had authority to depart from the Guidelines sentencing ranges, while reviewing the district court's factual findings only for clear error. *Id.* at 57a. The court held that a district court has legal authority to depart only when a proposed "mitigating" factor has not been adequately considered by the Sentencing Commission, see 18 U.S.C. 3553(b), Pet. App. 57a, and only when that ground is consistent with the sentencing purposes and structure of the Sentencing Reform Act of 1984, *id.* at 58a (citing 18 U.S.C. 3553(a) (court "shall impose a sentence sufficient" to comply with the purposes of retribution, deterrence, incapacitation, and rehabilitation). The court added that

> [a]though § 3553(b) does not define the term "aggravating or mitigating circumstance," the term does suggest a factor that constitutes a permissible basis for departure only if it speaks to the culpability of the defendant or the severity of the offense, or if it is otherwise related to some other congressionally-authorized legitimate sentencing concern.

Pet. App. 60a, quoting *United States* v. *Crippen*, 961 F.2d 882, 884 (9th Cir.), cert. denied, 113 S. Ct. 438 (1992) (emphasis deleted).

a. Applying that analysis, the court of appeals held that the district court erred in awarding the three-level departure based on a combination of three factors. Pet. App. 58a-69a. The court did not disagree with the district court's conclusion that several factors can sometimes be combined to form a basis for departure, even though no factor alone would warrant it. The court held, however, that each of the factors must still be examined to determine whether considering it as part of a mix is consistent with the structure and purposes of the Guidelines and the federal sentencing statutes. *Id.* at 58a-59a.

The court of appeals then held that none of the factors relied on by the district court formed a permissible component of a combination departure. The court concluded that the personal and professional consequences stemming from a criminal conviction are not permissible grounds for departure because they are "not tied to any penological purpose or legitimate sentencing concern expressed in the federal sentencing statutes." Pet. App. 62a. The sentences imposed under the Guidelines, the court explained, were not conceived to be the sole consequence of conviction for criminal offenses; collateral consequences such as job loss and social stigma are ordinary consequences of a criminal conviction. *Ibid.* Any attempt to separate collateral consequences that should serve as a ground for a departure from those that should not, the court noted, "would be boundless in the moral, social, and psychological examinations it required courts to make" and "can only lead to huge disparities," in contravention of "one of the overriding purposes of the Sentencing Guidelines." *Id.* at 63a. That factor

could also be used "consciously or unconsciously" as a way to take into account socio-economic status, "a factor that is *never* a permissible basis for departure." *Id.* at 63a.

The court of appeals held that susceptibility to abuse in prison by virtue of a person's status is also an impermissible factor to consider. Pet. App. 64a-66a. The court explained that such a departure ground is both "subjective and open-ended" and could be applied to numerous groups, such as gang members who may face increased abuse from members of a rival gang, police informants, or child abusers. *Id.* at 65a-66a. Noting that "the number of defendants who might qualify * * * is virtually unlimited," the court concluded that acceptance of that ground for a departure "would subvert the Guidelines' goal of reducing unwarranted disparities in sentencing." *Id.* at 66a.

The court of appeals next held that it was impermissible to consider the fact that petitioners are unlikely to engage in future unlawful conduct. Because the Commission has stated that the lower end of criminal history category I is set for an offender with no risk of recidivism, the court explained, that factor is already taken into account by the Guidelines. Pet. App. 67a-68a.

Finally, the court of appeals concluded that the district court's perception of a "specter of unfairness" arising from the successive state and federal prosecutions is not a permissible departure factor "because it speaks neither to the culpability of the defendant, the severity of the offense, nor to some other legitimate sentencing concern." Pet. App. 68a-69a. The court added that recognizing such a departure ground would conflict with the court's duty under 18 U.S.C. 3553(a)(2)(A) to impose a sentence that "[r]eflects the seriousness of the offense," and would undermine the Attorney General's determina-

tion that compelling federal interests warranted a second prosecution. *Id.* at 69a.

b. The court of appeals likewise held that the five-level departure for victim misconduct was not justified. The court explained that the district court's findings demonstrated that King's misconduct provoked only petitioners' initial lawful use of force, not their "offense behavior," as required by Guidelines § 5K2.10. By focusing on whether King's misconduct was a but-for cause of the unlawful conduct, rather than on whether that misconduct actually "provoked" the offense behavior, the district court had applied an incorrect legal standard. Pet. App. 70a-71a.

The court of appeals also concluded that the incident's volatility, and the fact that petitioners were justified in using force at its inception, did not remove the case from the "heartland" covered by Guidelines § 2H1.4. The court observed that in deciding whether a particular use of force is reasonable, *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989), expressly requires consideration of the fact that a police officer must often make split-second decisions about the amount of force required. That standard "strongly suggests that provocation by the victim in a situation where an officer must act quickly is typical—not unusual." Pet. App. 73a. The district court's view that such provocation takes a case out of the heartland, the court of appeals concluded, is particularly inapt in a criminal prosecution, in which the government must make the difficult showing that police officers "*willfully* came down on the wrong side of the *Graham* standard." *Ibid.*

4. The panel voted to deny rehearing, and the full court voted to deny the suggestions of rehearing en banc. Pet. App. 80a-81a. Judge Reinhardt, joined by eight other judges, dissented from the denial of rehearing en

banc on the sentencing issues. *Id.* at 81a-93a. The dissent argued that district courts should have considerable discretion to depart and that their decisions should be reviewed under a deferential standard. *Id.* at 88a-90a.

SUMMARY OF ARGUMENT

I. A. Congress enacted the Sentencing Reform Act of 1984 to eliminate what it viewed as intolerable disparities in sentences resulting from the unreviewable discretion exercised by individual district courts. It authorized the Sentencing Commission to establish sentencing ranges for defendants with similar criminal histories and similar offense conduct that would be binding on the courts, and it narrowly limited the circumstances in which courts may depart from those sentencing ranges. To depart downward from the applicable sentencing range, there must be a "mitigating" factor that has not been adequately considered by the Commission. 18 U.S.C. 3553(b). All departures must also be consistent with the purposes of sentencing stated in 18 U.S.C. 3553(a)(2) (retribution, deterrence, incapacitation, and rehabilitation). A crucial element of the federal sentencing scheme, not present in the prior system, is appellate review of sentences to enforce those limitations and to protect against unwarranted disparities arising from the differing sentencing approaches of individual district judges.

B. The language, structure, and purposes of the Sentencing Reform Act show that Congress intended courts of appeals to exercise de novo review over the validity of a ground for departure. The statute requires appellate courts to accept district court findings of fact unless they are clearly erroneous, and to give "due deference to a district court's application of the guidelines to the facts." 18 U.S.C. 3742(e). The logical inference is that Congress

intended reviewing courts to undertake de novo review of a district court determination that a factor is a legally permissible ground on which to depart. A de novo standard is consistent with the traditional plenary review of legal issues. The question whether the Commission has adequately considered a factor is essentially a matter of Guidelines interpretation, and the question whether a factor is consistent with the statutory sentencing goals is essentially a matter of explicating the statute. Both questions are therefore legal ones fit for a de novo standard.

The legislative history of the Sentencing Reform Act also supports de novo review. It shows that Congress contemplated that appellate courts would develop case law on departure grounds and that they would review legal issues de novo. That standard has its usual law-clarifying benefits, because departure decisions present recurring issues, and plenary review fosters a consistent and coherent body of departure law. De novo review is also essential to achieve Congress's goal of preventing unwarranted disparities in sentencing. Departures are potentially a huge loophole in Congress's sentencing scheme. Failure to apply close appellate oversight could lead to a return of disparate sentencing practices that Congress sought to replace.

II. The district court in this case relied on a variety of factors to depart downward by a total of eight levels from the Guidelines range. None of those factors constituted a legally permissible basis for departure.

A. All of the bases for the district court's three-level departure are impermissible ones. Job loss and its attendant consequences are in the heartland of excessive force cases. Moreover, because there is no judicially manageable standard for deciding which collateral consequences of conviction warrant a departure, acceptance of that

general ground would invite, and inevitably produce, unwarranted disparities in sentencing. It would also lead to effects that are indistinguishable from sentencing based on socio-economic status, a prohibited factor under the Act and Guidelines.

Unusual susceptibility to abuse in prison is also an impermissible factor. The degree of a defendant's vulnerability is entirely subjective, and the number of potential defendants who could claim unusual vulnerability is virtually unlimited. Permitting a downward departure on that ground would thus lead to unwarranted disparities. The Bureau of Prisons has a constitutional responsibility to protect persons it knows are unusually vulnerable to assault, and courts may not assume that it will not be fulfilled.

Nor is the likelihood that a defendant will not commit crime in the future a valid departure consideration; that factor is already taken into account in the defendant's criminal history category. While the Commission has authorized a departure when a defendant's criminal history category overstates the likelihood of recidivism, it has prohibited a departure on that basis below the bottom of criminal history category I.

Finally, this Court's double jeopardy decisions conclusively establish that there is no legally cognizable unfairness from successive state and federal prosecutions for the same conduct. Acceptance of successive prosecution as a departure ground would undermine the Attorney General's determination that compelling federal interests justified the prosecution in this case.

Because none of the departure grounds discussed above is permissible, a departure based on all of those grounds combined is also impermissible.

B. The district court's five-level departure for victim misconduct was also unwarranted. Under Guidelines

§ 5K2.10, victim misconduct must be a motivating factor for the offense behavior, not merely a but-for cause of it. The district court's findings, however, establish only that King's conduct provoked the incident itself and the initial lawful use of force; King's conduct did not provoke the offense behavior as required by Section 5K2.10. The district court's application of Section 5K2.10 therefore rests on an erroneous construction of the Guidelines.

Further, ordinary victim misconduct lies in the heartland of excessive force cases. The legal standard for determining whether an official used constitutionally excessive force is framed to account for victim misconduct. The requirement in a criminal case that the government prove that a defendant has acted willfully in using unreasonable force reinforces the conclusion that ordinary victim misconduct is not a mitigating factor.

ARGUMENT

I. A DISTRICT COURT'S DETERMINATION THAT A PARTICULAR FACTOR PROVIDES A LEGALLY PERMISSIBLE BASIS FOR DEPARTURE IS SUBJECT TO DE NOVO APPELLATE REVIEW

In the federal system, sentencing is governed by the Sentencing Reform Act of 1984, which requires a district court to impose a sentence within the applicable range under the Sentencing Guidelines unless there exists an aggravating or mitigating circumstance of a kind or to a degree that the Sentencing Commission did not adequately consider. Even if the Commission has not adequately considered a factor, a downward departure is permissible only when it is a "mitigating" factor, consistent with the purposes of sentencing identified in 18 U.S.C. 3553(a)(2), *i.e.*, retribution, deterrence, incapacitation, and rehabilitation. The question whether a particu-

lar departure ground satisfies those statutory requirements is subject to de novo appellate review.

A. Congress Intended Appellate Review To Be A Principal Check Against Unjustified Departures

In order to resolve the question presented in this case, it is necessary to understand the background and structure of the Sentencing Reform Act of 1984 and the Sentencing Commission's Guidelines. The Sentencing Reform Act responded to the widespread perception that federal sentences exhibited "shameful disparity." S. Rep. No. 225, 98th Cong., 1st Sess. 65 (1983); see *Mistretta* v. *United States*, 488 U.S. 361, 365-366 (1989). As the Senate Judiciary Committee explained, the disparity could be traced directly to the "unfettered discretion" the law conferred on district judges. S. Rep. No. 225 at 38. Without sentencing standards or review procedures, "each judge [was] left to apply his own notions of the purposes of sentencing." *Ibid.* The consequence was that "every day federal judges mete[d] out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances." *Ibid.* Congress's solution was the Sentencing Reform Act, which created "sweeping reforms" in the federal sentencing process. *Mistretta*, 488 U.S. at 366.

The statutory framework for departures: The Act created the United States Sentencing Commission, empowered the Commission to devise guidelines for sentencing, and made the Commission's guidelines binding on the courts. *Mistretta*, 488 U.S. at 361. Acting under that statutory authority, the Commission has issued guidelines that set sentencing ranges on the basis of the offender's conduct and criminal history category. See, *e.g.*, U.S.

Sentencing Commission, *Guidelines Manual* (Nov. 1994); *Nichols* v. *United States*, 114 S. Ct. 1921, 1924 n.3 (1994).

The Sentencing Reform Act carefully limits the authority of courts to depart from the sentencing ranges prescribed by the Commission's guidelines. A court "shall impose a sentence of the kind, and within the range" prescribed by the Guidelines "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. 3553(b). In determining whether the Commission adequately considered a circumstance, "the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. 3553(b). The Senate Committee Report reveals an intention that "most cases will result in sentences within the guideline range." S. Rep. No. 225 at 52. While the departure standard left some "flexibility" in sentencing where the guidelines did not address a situation, *id.* at 78, Congress rejected an amendment that would have given wide-open discretion to district courts to depart "whenever a judge determined that the characteristics of the offender or the circumstances of the offense warranted deviation," regardless of the consideration of that factor by the Commission. *Id.* at 79.[3]

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[3] In the course of debate on clarifying amendments to Section 3553(b), see Pub. L. No. 100-182, § 3, 101 Stat. 1266 (1987), several Senators emphasized that departures are reserved for a "rare and particularly unusual" case. 133 Cong. Rec. 33,109 (1987) (statement of Sen. Hatch). If the departure standard did not strictly limit departures to exceptional cases, "there [was] a danger that trial judges [would] be able to depart from the guidelines too freely, and such unwarranted

The Guidelines' treatment of departures: In keeping with Congress's intent, the Commission sought to narrow the circumstances in which a departure would be appropriate. The Guidelines, "offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practices." Sentencing Guidelines Ch. 1, Pt. A (Intro.) 4(b) (policy statement). In addition, the Commission issued policy statements indicating that some factors cannot be grounds for any sentencing determination: *e.g.* race, sex, national origin, creed, religion, and socio-economic status (§ 5H1.10). It also stated that certain factors "are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range" (Sentencing Guidelines Ch. 5, Pt. H, Introductory commentary): *e.g.* age (§ 5H1.1); education and vocational skills (§ 5H1.2); physical condition or appearance (§ 5H1.4); employment record (§ 5H1.5); family responsibilities (§ 5H1.6); and prior good works (§ 5H1.11). And it identified certain factors that may warrant a departure: *e.g.* victim conduct (§ 5K2.10); coercion and duress (§ 5K2.12); and diminished capacity (§ 5K2.13).

More generally, the Commission stated that each of the offense guidelines takes into account all conduct that occurs in its "heartland." Sentencing Guidelines Ch. 1, Pt. A (Intro.) 4(b) (policy statement). The Commission intended for courts "to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes." *Ibid.* A departure is permissible only "[w]hen a court finds an atypical

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departures would undermine the core function of the guidelines, which is to reduce disparity." *Ibid.*; accord *id.* at 33,108-33,109 (joint statement of Senators Biden, Thurmond, Kennedy, and Hatch).

case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm." *Ibid.* The Commission did "not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case." *Ibid.* But because the Commission sought to take into account the factors that experience had shown made a significant difference in sentencing, it anticipated that such departures would be "highly infrequent." *Ibid.*

District court departure decisions: In order for a case to be a candidate for departure, a district court must determine that the Commission has not given adequate consideration to a particular aggravating or mitigating circumstance. If the court finds that such a factor takes a case outside of a guideline's "heartland," it "may then go on to consider, in light of the sentencing system's purposes, *see* 18 U.S.C. § 3553(a), (and the Guidelines themselves) whether or not the 'unusual' features of the case justify departure." *United States* v. *Rivera*, 994 F.2d 942, 947 (1st Cir. 1993) (Breyer, C.J.); see also *id.* at 949. Section 3553(a) provides that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." Paragraph (2), in turn, provides that the sentence imposed must (A) "reflect the seriousness of the offense, * * * promote respect for the law, and provide just punishment for the offense," (B) "afford adequate deterrence to criminal conduct," (C) "protect the public from further crimes of the defendant," and (D) "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. 3553(a)(2). That provision was intended to assure for the first time that the federal criminal justice system would

adhere to a consistent sentencing philosophy. S. Rep. No. 225 at 59-60; see also *id.* at 75-76. Section 3553(a) further directs the court "to consider the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6). That subsection "requires judges to avoid unwarranted disparity in applying the guidelines and particularly in deciding when it is desirable to sentence outside the guidelines." S. Rep. No. 225 at 78.

Appellate review: A "critical" component of preventing unwarranted sentencing disparities is the provision for appellate review of departures, at the behest of both the defendant and the government. S. Rep. No. 225 at 151. Under 18 U.S.C. 3742(a) and (b), either the defendant or the government may appeal a sentence that "was imposed as a result of an incorrect application of the sentencing guidelines." A district court's reliance on an invalid departure ground in imposing a sentence constitutes an "incorrect application" of the sentencing guidelines within the meaning of those provisions. *Williams* v. *United States*, 503 U.S. 193, 200 (1992). A sentence must also be set aside if it is "outside the guideline range, and is unreasonable." 18 U.S.C. 3742(e)(3), (f)(2); *Williams*, 503 U.S. at 202.

While a discretionary decision by a district court not to depart from the Guidelines is not appealable, the Act permits the government to appeal a downward departure, and it permits a defendant to appeal an upward one. 18 U.S.C. 3742(a) and (b). That appellate review structure was designed by Congress as part of "an effort to achieve greater uniformity" in sentencing, S. Rep. No. 225 at 65, and "to reduce materially any remaining unwarranted disparity" after application of the guide-

lines, *id.* at 86.[4] Government appeals of departure decisions were of particular importance. As the Senate Report explains, "it is essential that there be a mechanism to appeal on behalf of the public those sentences which fall below the applicable guidelines." *Id.* at 65. The Report further explains that "[b]ecause sentencing judges retain the flexibility of sentencing outside the guidelines, it is inevitable that some of the sentences outside the guidelines will appear to be too severe or too lenient. Appellate review of sentences is essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines." *Id.* at 151. By providing for appeals by both parties, the Act laid the groundwork for "the development of a principled and balanced body of appellate case law" on departures. *Id.* at 151.[5]

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[4] Before the Sentencing Reform Act, this Court had noted the strong and vocal criticism that the federal sentencing system invited arbitrary decisions, and, in rejecting a double jeopardy challenge to the government's appeal of a sentence, observed that "[a]ppellate review creates a check upon this unlimited power, and should lead to a greater degree of consistency in sentencing." *United States* v. *DiFrancesco*, 449 U.S. 117, 143 (1980). The Senate Report quoted this language in explaining the validity of the review procedures it prescribed. S. Rep. No. 225 at 153.

[5] The case law was, in turn, expected to "assist the Sentencing Commission in refining the sentencing guidelines as the need arises. For example, if the courts found that a particular offense or offender characteristic that was not considered, or adequately reflected, in formulation of the guidelines was an appropriate reason for imposing sentences that differed from those recommended in the guidelines, the Sentencing Commission might wish to consider amending the guidelines to reflect the factor." S. Rep. No. 225 at 151.

B. Congress Intended Appellate Courts To Exercise De Novo Review Of The Validity Of A Departure Ground

The text, structure, and design of the Sentencing Reform Act uniformly point to the application of a de novo, rather than deferential, standard of review of the question whether a departure ground relied on by a district court is a permissible one, *i.e.* whether it was adequately considered by the Commission within the meaning of 18 U.S.C. 3553(b) and is an "aggravating or mitigating" factor consistent with the purposes of sentencing in 18 U.S.C. 3553(a).

1. *Statutory text.* The text of the appellate review provisions strongly supports de novo review. In 1988, Congress amended the Act to provide that in appeals of Guidelines rulings:

> The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

18 U.S.C. 3742(e). Congress thus expressly required the usual deference to a district court's findings of fact, and provided for "due deference" to its application of the guidelines to the facts. Congress's express provision for a measure of deference on those two appellate issues strongly implies that it envisioned that courts would conduct de novo review on the threshold legal question whether the ground for departure relied on by the district court is a permissible one.

De novo review of the validity of a particular departure ground accords with the general rule that legal

questions are reviewed de novo. See *Salve Regina College* v. *Russell*, 499 U.S. 225, 231-233 (1991); *Pierce* v. *Underwood*, 487 U.S. 552, 558 (1988); see *First Options of Chicago, Inc.* v. *Kaplan*, 115 S. Ct. 1920, 1926 (1995). As the Court has noted, "[i]ndependent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration." *Salve Regina*, 499 U.S. at 231. The issues of whether a departure ground was adequately considered by the Commission and whether it is consistent with the requirements of Section 3553(a) are both legal in character.

In determining whether the Commission has adequately considered a factor, a court must decide whether the Commission has categorized the factor as a prohibited ground for departure, a generally inappropriate basis for departure, or a generally permissible one. It must also decide whether the factor has already been adequately taken into account by the Commission in framing the "heartland" of the applicable offense guidelines. In resolving those issues, a court may not consider evidentiary proof. By statute, a court must resolve those issues "only" by considering "the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. 3553(b). Determining whether the Commission has adequately considered a factor is therefore essentially a matter of interpreting the Commission's guidelines. For that reason, it is an issue of law, subject to de novo review. As Justice Souter has explained, because the question of adequate consideration "goes essentially to the Commission's intentions," and turns "not on an evidentiary record," but "on documented administrative history and commentary," it is "an issue of law subject to customary appellate review."

See *Burns* v. *United States*, 501 U.S. 129, 151-152 & n.6 (1991) (Souter, J., dissenting).[6]

For similar reasons, the question whether a departure ground is consistent with the purposes of sentencing described in 18 U.S.C. 3553(a) is also an issue of law. As the text of Section 3553(a) makes clear, compliance with its requirements is an independent statutory duty. See 18 U.S.C. 3553(a) ("court *shall* impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection") (emphasis added). Thus, even when a factor has not been taken into account by the Commission, a departure is permissible only if it promotes the four stated purposes of sentencing (retribution, deterrence, incapacitation, and rehabilitation, 18 U.S.C. 3553(a)), and would not lead to unwarranted sentencing disparities between defendants with similar records found guilty of similar conduct (18 U.S.C. 3553(a)(6)).

The purposes of sentencing set forth in Section 3553(a) also shed light on whether a factor is "aggravating" or "mitigating" and whether a circumstance "should result" in a departure within the meaning of Section 3553(b). See *United States* v. *Clark*, 8 F.3d 839, 842 (D.C. Cir. 1993) ("To qualify as 'mitigating,' a circumstance must be linked to one of the stated purposes of sentencing, *i.e.*, just punishment, adequate deterrence, public protection, or rehabilitation"). *United States* v. *Crippen*, 961 F.2d 882, 884 (9th Cir.), cert. denied, 113 S. Ct. 438 (1992);

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[6] In *Burns*, the Court held that a district court that intends to depart from the Guidelines range based on a factor not previously identified by the presentence report must give reasonable notice to the parties of that intention. 501 U.S. at 138-139. The majority did not reach or address the issue discussed by Justice Souter of how a court should determine whether the Commission took adequate account of a particular factor in fashioning the Guidelines.

United States v. *Smith*, 14 F.3d 662, 666 (1st Cir. 1994) (to decide whether a circumstance not taken into account by the Commission should result in a departure "a court should look to the sentencing system's purposes"); see also *United States* v. *Mogel*, 956 F.2d 1555, 1563 (11th Cir.), ("[a]ll departures must be firmly grounded in one or more of the relevant penological goals underlying the Guidelines") cert. denied, 113 S. Ct. 167 (1992). Indeed, the core meaning of "mitigating" is linked to purposes of sentencing that primarily relate to the defendant's culpability or the seriousness of the offense. See *Black's Law Dictionary*, 1002 (6th ed. 1990) (defining "mitigating circumstances" as "[s]uch as do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability").[7]

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[7] As the court of appeals in this case concluded (Pet. App. 60a-61a & n.33), the question whether a departure ground is consistent with Section 3553(a) will often depend on whether it relates to the "culpability of the defendant or the severity of the offense." All of the departure factors encouraged by the Commission fall into one of those two categories (*e.g.*, death, physical injury, and unlawful restraint bear on the seriousness of the offense, while lesser harms, coercion, and diminished capacity bear on the culpability of the defendant). The Commission has also expressly discouraged departures based on certain factors that do not relate to the culpability of the defendant or the seriousness of the offense (*e.g.*, family circumstances, physical infirmity). That does not mean that factors that are unrelated to the defendant's culpability or the seriousness of the offense can never constitute grounds for departure. See Pet. App. 61a n.33. It does mean, however, that such factors should be carefully scrutinized to insure that they promote one of the purposes of sentencing expressed in the Sentencing Reform Act and would not lead to unwarranted sentencing disparities.

The application of the purposes listed in Section 3553(a), both as an independent statutory requirement and as the source for interpreting the terms "mitigating" and "should result" in Section 3553(b), requires courts to measure proposed departure grounds against legal benchmarks that govern the imposition of sentences.[8] Departures from the Guidelines therefore involve issues of law that are subject to a plenary standard of appellate review. *United States* v. *Lira-Barraza*, 941 F.2d 745, 746 (9th Cir. 1991) (en banc).

2. *Legislative history.* The legislative history of the Sentencing Reform Act also supports the conclusion that the legal validity of a departure ground is subject to de novo review. The Senate Report states that "[a]ppellate review of sentences is essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines. This in turn will assist the Sentencing Commission in refining the sentencing guidelines as the need arises." S. Rep. No. 225 at 151. De novo review is best suited to those tasks.

The Sentencing Reform Act originally contained no provision defining the applicable standards for appellate review. In 1988, Congress added to 18 U.S.C. 3742(e) the provision requiring courts of appeals to give "due deference" in reviewing the application of the guidelines to the facts. 102 Stat. 4417. The House section-by section analysis explains that when a party appeals on the

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[8] The reviewing court must also consider the purposes of sentencing in evaluating the reasonableness of a departure under 18 U.S.C. 3742(e)(3) (requiring court of appeals to determine whether a sentence is "outside the applicable guideline range, and is unreasonable," with regard for (A) "the factors to be considered in imposing a sentence," as set forth in 18 U.S.C. 3553(a), and (B) the district court's stated reasons for the sentence).

ground that the district court has incorrectly applied the guidelines, findings of fact are reviewed for clear error, but "[t]he court of appeals will scrutinize more closely a district court determination of a legal question, applying a *de novo* standard." 134 Cong. Rec. 33,303 (1988). The section-by-section analysis further explains that the new due deference standard was intended to give appellate courts "flexibility" in reviewing the application of the guidelines to the facts. If the particular determination more closely resembles a factual issue, something approaching clear error review would apply. On the other hand, if the issue more closely resembles a legal issue, something approaching de novo review would apply. *Id.* at 33,303. Those statements reinforce the conclusion that de novo review is appropriate for the legal question of whether a departure ground is permissible in the first place.

3. *Institutional advantages.* De novo review of departure grounds also "produce[s] the normal law-clarifying benefits that come from an appellate decision on a question of law." *Pierce*, 487 U.S. at 561; see *Thompson* v. *Keohane*, No. 94-6615, (Nov. 29, 1995), slip op. 16 ("the law declaration aspect of independent review potentially may * * * unify precedent and stabilize the law"; holding that "in custody" determinations for purposes of *Miranda* are subject to independent, rather than deferential, federal review in habeas corpus proceedings). The body of decisional law in the courts of appeals illustrates the recurring issues faced in the departure context and the courts of appeals' distillation of general legal principles.

In examining whether particular departure factors accord with the purposes of sentencing listed in 18 U.S.C. 3553(a), courts of appeals have repeatedly resolved legal issues that turn on identifiable and recurrent principles.

For example, courts have often encountered claims that various forms of alleged government misconduct constituted a valid basis for a downward departure. That claim has universally been rejected, on the basis that, while the Commission had not considered such an unusual circumstance, recognizing that ground for departure would "run[] counter to a primary purpose of the sentencing system, which is to deter criminal conduct." See *United States* v. *Smith*, 14 F.3d 662, 666 (1st Cir. 1994) (fact that INS gave defendant incorrect information about the criminal penalty he would face upon illegal reentry did not justify a downward departure); accord *United States* v. *Gomez-Villa*, 59 F.3d 1199, 1202 (11th Cir. 1995), petition for cert. pending, No. 95-6028; *United States* v. *Ullyses-Salazar*, 28 F.3d 932, 938 (9th Cir. 1994), cert. denied, 115 S. Ct. 1367 (1995); *United States* v. *Agubata*, 60 F.3d 1081, 1084 (4th Cir. 1995), petition for cert. pending, No. 95-6524; *United States* v. *Cruz-Flores*, 56 F.3d 461, 464 (2d Cir. 1995); see also *United States* v. *Pacheco-Osuna*, 23 F.3d 269, 272 (9th Cir. 1994) (Fourth Amendment violation); *United States* v. *Williams*, 978 F.2d 1133, 1136 (9th Cir.) (perjury before a grand jury), cert. denied, 113 S. Ct. 1606 (1992); *United States* v. *Valencia-Lucena*, 925 F.2d 506, 515 (1st Cir. 1991) (same as *Williams*).

The determination of whether a particular factor is within the "heartland" likewise benefits from de novo review. For example, in *United States* v. *Rivera*, 994 F.2d 942, 945 (1st Cir. 1993), the district court sentenced the defendant to probation rather than to prison, as the Guidelines dictated, in order to allow him to continue working and thereby make restitution. The First Circuit, "deciding the question as a pure matter of law," reversed. It held that "the embezzlement guidelines encompass, within their 'heartland,' embezzlement accom-

panied by *normal* restitution needs and practicalities," and thus that such needs cannot justify a downward departure. *Id.* at 955. The court explained "that the embezzlement guidelines are written for ordinary cases of embezzlement, that restitution is called for in many such cases, and that prison terms often make restitution somewhat more difficult to achieve." *Ibid.* The court also noted that recognizing such a departure ground would run contrary to the Commission's intent to equalize punishments for white collar and blue collar crimes. *Ibid.* That resolution is consistent with the holdings of other courts. See *id.* at 956 (citing *United States* v. *Harpst*, 949 F.2d 860, 863 (6th Cir. 1991) and *United States* v. *Bolden*, 889 F.2d 1336, 1340 (4th Cir. 1989)). Other heartland issues have been similarly resolved through application of de novo review. See, *e.g.*, *United States* v. *Rutana*, 932 F.2d 1155, 1158 (6th Cir.) (fact that the imprisonment of an industrial polluter would work a hardship on the defendant's employees and their families did not take the case outside the heartland of the industrial pollution guidelines), cert. denied, 502 U.S. 907 (1991).

The application of de novo review has enabled courts of appeals to fulfill the expectation voiced in the legislative history that sentencing appeals would promote "the development of a principled and balanced body of appellate case law." S. Rep. No. 225 at 151. Courts have ruled that the following are not permissible grounds for a departure: the possibility of deportation following a sentence, *United States* v. *Restrepo*, 999 F.2d 640, 646-647 (2d Cir.), cert. denied, 114 S. Ct. 405 (1993); the loss of good time credits resulting from the offense conduct, *United States* v. *Newby*, 11 F.3d 1143, 1148-1149 (3d Cir. 1993), cert. denied, 114 S. Ct. 1841 (1994); equalizing a sentence with that of a co-defendant, *United States* v.

Wogan, 938 F.2d 1446, 1448 (1st Cir.), cert. denied, 502 U.S. 969 (1991); the shooting of the defendant by a third-party, *United States* v. *Mason*, 966 F.2d 1488, 1494 (D.C. Cir.), cert. denied, 113 S. Ct. 829 (1992); the imprisonment of a spouse, *United States* v. *Pozzy*, 902 F.2d 133, 139 (1st Cir.), cert. denied, 498 U.S. 943 (1990); the absence of any need to incarcerate, *United States* v. *Brewer*, 899 F.2d 503, 509-510 (6th Cir.), cert. denied, 498 U.S. 844 (1990); a jury recommendation for leniency, *United States* v. *Mickens*, 926 F.2d 1323, 1333 (2d Cir.), cert. denied, 502 U.S. 1060 (1991); a violation of state speedy trial requirements leading to federal prosecution for the same conduct, *United States* v. *Deitz*, 991 F.2d 443, 445-446 (8th Cir. 1993); the community perception that the sentence is excessive, *United States* v. *Hadaway*, 998 F.2d 917, 920-921 (11th Cir. 1993); the alleged weakness of the government's case, *United States* v. *Brooks*, 966 F.2d at 1505 (D.C. Cir. 1992); and the prosecutor's discretion to bring a case in federal rather than local court, *United States* v. *Clark*, 8 F.3d 839, 842-843 (D.C. Cir. 1993). Those decisions show that de novo review furthers the development of a coherent body of law concerning when it is legally permissible to depart from the Guidelines.

4. *Statutory purposes.* De novo review is also essential to serve Congress's goal of eliminating unwarranted disparity in sentencing. The disparities that Congress sought to remedy through the Sentencing Reform Act stemmed principally from the widely varying sentencing philosophies of district judges who exercised discretion in sentencing without any check in law or through appellate review. The review of departures under a deferential standard would invite a return to such individualized sentencing decisions.

Disparity in sentencing is particularly problematic when it results from the different interpretations of the law held by individual district judges. It is one thing to acknowledge that a recognized departure ground may be applied to particular facts in varying ways from courtroom to courtroom. But it is another thing altogether to delegate to district courts the legal power to make different decisions about what constitutes a permissible departure ground. The application of deferential, rather than de novo, review would yield precisely that result. Inherent in the concept of deference is that two different judges looking at the same factor can reach opposite conclusions about whether it is a legally permissible basis for departure. Absent de novo review, in many circumstances, each of those contrary conclusions would have to be affirmed.

That consequence cannot be reconciled with the purposes of the Sentencing Reform Act. Government misconduct either is or is not a basis for departure; ordinary restitution needs either are or are not a permissible basis for departure in an embezzlement case; the loss of jobs suffered by employees either is or is not a valid basis for departure in an industrial pollution case. Under the system created by Congress, they cannot be both. The same is true of the departure grounds involved in this case. Congress did not intend to create a sentencing system in which job loss, unusual susceptibility to abuse in prison, unlikelihood of recidivism, dual prosecution, and ordinary provocation in an excessive force case would be legally permissible grounds for a departure in some courtrooms, but not others. De novo review is necessary to prevent that form of disparity from becoming routine in the federal sentencing system.

Of course, through its power to revise the guidelines, the Commission plays a central role in ensuring even-

handed sentencing determinations. See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991); 28 U.S.C. 994(*o*). But the Commission's function is complemented, not undercut, by plenary appellate review of the permissibility of particular grounds for departure. While the Commission monitors the work product of both district courts and courts of appeals, the sheer volume of district court departure decisions, and the absence of a complete legal analysis in many of those decisions, greatly diminishes the utility of those results as raw material for the Commission to analyze. In contrast, the Commission may readily consult court of appeals decisions, benefit from the detailed and thorough application of the law to the facts in written opinions, and revise the Guidelines in response to factors that emerge as warranting clarification on a nationwide level. The Commission in fact pays particular attention to the work product of the appellate courts, including by systematically tracking grounds for departure decisions.[9] Congress's goal of eliminating unwarranted disparities is therefore best realized by de novo review of the legal validity of a departure ground.

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[9] See U.S. Sentencing Commission, *Annual Report* 13-19 (1994) (tables and discussion of approved and disapproved departure factors at the appellate level). The Commission's review of appellate court decisions is, for many reasons, a more searching and complex endeavor than its tracking of district court decisions. See *id.* at 133, 135 (describing the "collaborative effort of the Commission's legal, monitoring, and policy analysis staffs" in reviewing all published and unpublished appellate decisions involving sentencing issues); *cf. id.* at 82 & n.1 (noting that, exclusive of downward departures for substantial assistance, 29,971 district court sentencing determinations were reported to the Commission, 2,932 of which involved downward departures; providing a summary table of major grounds cited).

C. The Arguments Against De Novo Review Are Unsound

Petitioners offer four arguments in favor of deferential review: the intention of the Sentencing Reform Act to leave some discretion in the hands of sentencing judges; the historic tradition in favor of sentencing discretion; the supposed superior perspective of district courts on departure decisions; and the resistance of departure decisions to useful legal generalizations. Koon Br. 22-37; see Powell Br. 33-36. Those arguments do not justify deferential review, and in many respects are at odds with the central purposes and provisions of the Act.

Congress did leave district courts with some sentencing discretion, and it did instruct appellate courts to give "due deference" to a district court's application of the guidelines to the facts. See 18 U.S.C. 3742(e). But it does not follow that Congress also intended to give district courts deference in deciding whether a departure ground is legally permissible. Koon Br. 22-33. As we have explained, see pp. 16-21, *supra*, the central aim of the Sentencing Reform Act was to cabin sentencing discretion in order to eliminate unwarranted disparities, and appellate review was instituted as a principal means to attain that goal.

Likewise, the long history of appellate court deference to district court sentencing decisions, Koon Br. 33-35, does not counsel in favor of a highly deferential standard of review for departure decisions. Koon relies (Br. 34-25) on this Court's statements in *Williams* v. *United States*, 503 U.S. 193, 205 (1992), that the Act "did not alter a court of appeals' traditional deference to a district court's exercise of sentencing discretion," and "[t]he selection of the appropriate sentence from within the guideline range, as well as the decision to depart from

the range in certain circumstances, are decisions that are left solely to the sentencing court." Those statements are simply a shorthand way of acknowledging that the decision to depart is discretionary when there is a permissible ground for departure; only then is a departure decision "solely" the district court's to make. 503 U.S. at 205. As *Williams* itself made clear, the district court may be reversed as a matter of law for an "incorrect application of the Guidelines," *i.e.* when it "depart[s] from the applicable sentencing ranged based on a factor that the Commission has already fully considered in establishing the guideline range." *Id.* at 200.

Selecting the appropriate standard of review often depends on which judicial actor is institutionally better suited to make the determination in question. See *First Options*, 115 S. Ct. at 1926. Contrary to Koon's contention, Br. 35-36, however, the question whether a ground for departure is permissible does not turn on the credibility of witnesses or a judge's feel for the case, factors that favor deferential review. Rather, answering that question turns primarily on interpretation of the Guidelines and explication of Section 3553(a). Appellate courts are therefore better positioned to decide whether a departure ground is legally permissible.

Koon errs in contending (Br. 36-37) that departure decisions are so fact-specific as to resist meaningful generalization, and that de novo review is therefore inappropriate. In contrast to the need for district court "supervision of litigation" on fact-bound issues, which supported abuse-of-discretion review in *Pierce*, 487 U.S. at 558 n.1, and *Cooter & Gell* v. *Hartmax Corp.*, 496 U.S. 384, 401-405 (1990), departures from the Guidelines *do* tend to fall into categories involving recurring questions.

See pp. 27-30, *supra*. Reviewing those issues de novo furthers the development of a coherent body of law.

Although Koon has framed the question before this Court (Koon Br. (i)) as a choice between de novo review or "the deferential standard set forth in *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993)," the level of deference proposed by Koon appears to go far beyond the approach outlined in *Rivera*. In *Rivera*, the court of appeals recognized that "plenary review is appropriate where the question on review is simply whether or not the allegedly special circumstances (i.e., the reasons for departure) are of the 'kind' that the Guidelines, in principle, permit the district court to consider at all." 994 F.2d at 951. The court also indicated that plenary review is appropriate when the issue is the "quintessentially legal" one of interpreting the language of a guideline, in light of its underlying purpose, to delineate its "heartland." *Ibid*. *Rivera* went on to hold only that review should be deferential, rather than plenary, when a district court makes a determination "of whether (and the extent to which) given circumstances make a case 'unusual' or 'not ordinary.'" *Id*. at 952.

The question whether a court of appeals should defer to a district court's determinations of "unusualness" for purposes of departure is not presented by the facts of this case, because the grounds cited by the district court are invalid as a matter of law.[10] Nevertheless, in our view,

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[10] Koon argues (Br. 27) that the only gateway that a permissible departure must pass through is the Sentencing Guidelines themselves (*i.e.*, that any factor that takes a case out of the "heartland" and is not prohibited by the Guidelines may form a permissible basis for departure). Some language in *Rivera* supports that analysis (see 994 F.2d at 947), although the First Circuit itself has not read *Rivera* to bar de novo review of departure factors for consistency with the statute. See *United States* v. *Smith*, 14 F.3d 662, 666 (1st Cir. 1994) (conducting

determinations on issues of recurring importance, such as whether sole custody of young children constitutes unusual family circumstances, are best reviewed de novo. Whatever comparative advantages the district court may have in its "'feel' for the unique circumstances of the particular case before it" and in its familiarity with "ordinary" Guidelines cases, *Rivera*, 994 F.2d at 951, those advantages are more than offset by the broad perspective acquired by the courts of appeals over time and their ability to harmonize and reconcile results in different courtrooms throughout the circuit or nation. Exercising de novo review, the courts of appeals may resolve such issues "with a view to identifying recurrent patterns, and advancing uniform outcomes. If [courts] cannot supply a 'definite rule,' they nonetheless can reduce the area of uncertainty." *Thompson* v. *Keohane*, slip op. 13-14 n.13.

II. THE DISTRICT COURT'S GROUNDS FOR DEPARTURE WERE LEGALLY INVALID

Each of the factors that the district court invoked to justify its departure below the Guidelines range rested on considerations that either were adequately taken into

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plenary review and invalidating factor as inconsistent with statutory purposes, even though the factor was not considered by the Commission). To the extent that *Rivera* does suggest that departures need not be tested against the statute, we respectfully disagree. As the decisions of the courts of appeals indicate, see pp. 27-30, *supra*, not every "unusual" factor left out of the Guidelines satisfies the Sentencing Reform Act's requirements. And the Guidelines themselves indicate that a circumstance that is normally irrelevant to departure may become relevant if it "is present to an unusual degree and distinguishes the case from the 'heartland' of cases covered by the guidelines *in a way that is important to the statutory purposes of sentencing*." Guidelines § 5K2.0 (Grounds for Departure) (policy statement).

account by the Sentencing Commission or constitute impermissible grounds for departure in light of the statutory purposes of sentencing. The court of appeals was not required to defer to the district court's determination that those factors were legally valid bases for departure.[11]

A. The District Court Erred Iin Granting A Three-Level Downward Departure Based On Its Combination Of Factors

The district court granted a three level downward departure based on a combination of: (1) additional "punishment" and potential abuse in prison; (2) the absence of a need for public protection; (3) the perceived unfairness of successive state and federal prosecutions. Pet. App. 120a, 121a, 124a-131a. None of these departure factors is legally valid, either alone or in combination.

1. a. The district court found that, as a result of their convictions, petitioners would lose their jobs, be disqualified from prospective employment in law enforcement, and suffer anguish and disgrace from those deprivations. Pet. App. 126a-128a. That series of consequences is not a permissible ground for a departure. Public officials who abuse their public trust and violate the constitutional rights of citizens in violation of 18 U.S.C. 242 will often lose their jobs and suffer lasting

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[11] Even if petitioner Koon were correct in contending (Br. 18) that the Court should adopt a "deferential, abuse-of-discretion standard" for departure decisions, it would not assist him. Courts of appeals must always review de novo the question whether the district court exercised its discretion on the basis of an erroneous view of the law. *Cooter & Gell*, 496 U.S. at 402, 405. And when a district court departs on the basis of a legally impermissible departure ground, it has necessarily abused its discretion. See *Schlup* v. *Delo*, 115 S. Ct. 851, 870 (1995) (O'Connor, J., concurring).

damage to their careers and their reputations. For police officers convicted of a felony, such consequences are virtually automatic. Those consequences therefore do not take a case out of the "heartland" of Guidelines § 2H1.4, which applies to violations of 18 U.S.C. 242.

More generally, persons convicted of crimes suffer a wide range of consequences in addition to the sentence. Defendants may lose employment, face divorce, become impoverished, lose their homes, suffer public humiliation, lose the respect of their children, and endure innumerable other adversities. Any attempt to separate which of such collateral consequences should serve as a ground for a departure from those that should not "would create a system of sentencing that would be boundless in the moral, social, and psychological examinations it required courts to make." Pet. App. 63a. Unanchored to any objective standard, the end result would ineluctably be unwarranted disparities in sentencing in violation of 18 U.S.C. 3553(a)(6).

In particular, if lawyers, police officers, and others in positions of trust were eligible for shorter sentences than less prominent defendants because they suffer more from a conviction, it would lead, "consciously or unconsciously" (Pet. App. 63a), to sentencing based on socioeconomic status, a factor that is never permissible to consider. See 28 U.S.C. 994(d); Guidelines § 5H1.10. Such a downward departure would also have the effect of reversing the Commission's determination that those who abuse the public trust should receive stiffer sentences than others. Guidelines § 3B1.3 commentary (background); Ch.2, Pt.H, Introductory commentary; § 2H1.4, commentary (background). The court of appeals therefore correctly rejected job loss and its attendant consequences as a valid ground for a departure.

b. The district court's finding (Pet. App. 125a) that petitioners would suffer additional punishment because they are particularly likely to be targets of abuse in prison is likewise an invalid factor in considering a departure. Congress directed the Commission to take into account the "nature" of penal facilities in formulating the Sentencing Guidelines. 28 U.S.C. 994(g). In response, the Commission's policy statements indicate that a defendant's age or physical impairment might justify a departure in extreme cases. See Guidelines §§ 5H1.1; 5H1.4. In contrast, the Guidelines do not provide for a departure on the ground that a defendant may be particularly vulnerable to abuse in prison. It is therefore reasonable to infer that the Commission rejected unusual susceptibility to abuse in prison as a ground for departure. See *United States* v. *Lara*, 905 F.2d 599, 607 (2d Cir. 1990) (Metzner, J., dissenting).

The degree of vulnerability to assault is an entirely "subjective" judgment, and the number of defendants who may qualify for that departure is "virtually unlimited." Defendants in general face varying risks of harassment in prison (*e.g.*, a person with a reputation as an informant, a person convicted of a particularly reviled crime). Permitting downward departures based upon claims of unusual susceptibility to assault would therefore subvert the Guidelines' goal of uniformity in sentencing. See *United States* v. *Gonzalez*, 945 F.2d 525, 527-529 (2d Cir. 1991) (Winter, J. dissenting); see also *United States* v. *Smith*, 27 F.2d 649, 666 (D.C. Cir. 1994) (Sentelle, J., dissenting) (rejecting unusual susceptibility to assault as a basis for downward departure, reasoning that, if such a basis were accepted, someone who is especially safe from assault, such as a boxing champion, would be eligible for an upward departure). The Bureau of Prisons has a constitutional responsibility to protect persons who are

known to be unusually vulnerable. *Farmer* v. *Brennan*, 114 S. Ct. 1970 (1994). A sentencing court cannot assume that the Bureau will shirk its responsibility.

2. In awarding its three-level departure, the district court also relied on its view that petitioners were not likely to engage in future criminal conduct and their incarceration therefore was not necessary to protect the public. Pet. App. 128a-129a. The Guidelines, however, expressly prohibit that method of taking the unlikelihood of recidivism into account. Under the Guidelines, the likelihood that a defendant will commit a crime in the future is reflected in a defendant's criminal history category. See Guidelines Ch. 4, Pt. A, Introductory commentary. Although the Commission has authorized a court to depart downward when the defendant's criminal history category overstates that defendant's potential for recidivism, it has prohibited a departure below the bottom of the range set for criminal history category I: "The lower limit of the range for Criminal History Category I is set for a first time offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate." Guidelines § 4A1.3 (policy statement); see *United States* v. *Farah*, 991 F.2d 1065, 1070 (2d Cir. 1993); *United States* v. *Mogel*, 956 F.2d at 1563.

3. The district court also erred in positing, and then relying on, the "specter of unfairness" in successive state and federal prosecutions for the same conduct. Pet. App. 130a-131a. This Court has repeatedly held that "the Constitution does not prohibit successive prosecutions by different sovereigns based on the same conduct." *Department of Revenue* v. *Kurth Ranch*, 114 S. Ct. 1937, 1948 n.22 (1994); see *Heath* v. *Alabama*, 474 U.S. 82

(1985); *Abbate* v. *United States*, 359 U.S. 187, 194 (1959). That holding is grounded in the principle that "[w]hen a defendant in a single act violates the peace and dignity of two sovereigns by breaking the laws of each, he has committed two distinct offenses." *Heath*, 474 U.S. at 88. It also reflects the concern that "if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered." *Ibid.* There is, therefore, no legally cognizable unfairness in successive state and federal prosecutions, and a district court's contrary view does not make it a "mitigating" factor within the meaning of 18 U.S.C. 3553(b).[12]

That is particularly true because under the so-called *Petite* policy, see *Petite* v. *United States*, 361 U.S. 529 (1960) (per curiam), the Attorney General will generally decline to authorize a second prosecution unless it is justified by "compelling Federal interests." See *United States* v. *Snell*, 592 F.2d 1083, 1087 (9th Cir.), cert. denied, 442 U.S. 944 (1979); U.S. Attorney's Manual 9-2.142. As the court of appeals explained, in this case the Attorney General's authorization of a second prosecution "necessarily reflected the conclusion that the distinct federal interests in protecting the constitutional rights of citizens to be free from unreasonable force at the hands of government had not been adequately

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[12] As the D.C. Circuit has explained: "The Commission wrote guidelines for an existing system of criminal procedure; it almost certainly did not intend that decisions traditionally within the prosecutor's ken, and within constitutional bounds, be counterbalanced by a sentencing court." *United States* v. *Dockery*, 965 F.2d 1112, 1117 (D.C. Cir. 1992); *Clark*, 8 F.3d at 842 ("[a] routine exercise of prosecutorial discretion cannot rise to the level of a 'mitigating circumstance' ").

vindicated in the state court proceeding." Pet. App. 69a. The district court's disagreement with the Attorney General's conclusion cannot form the basis for a downward departure.

Finally, reliance on a specter of unfairness in dual prosecutions is impermissible "because it speaks neither to the culpability of the defendant, the severity of the offense, nor to some other legitimate sentencing concern." Pet. App. 69a. To the contrary, application of that factor conflicts with the court's duty to impose a sentence that "reflect[s] the seriousness of the offense," 18 U.S.C. 3553(a)(2)(A), because it would depreciate the seriousness of petitioners' crimes to view the federal government's decision to intervene as "unfair." [13]

4. Because none of the three grounds for departure was a permissible one, a departure based on a combination of those three grounds was also impermissible. In an extraordinary case, a unique combination of factors may warrant a departure, even though no one factor alone would. See Guidelines § 5K2.0 (Grounds for Departure) (policy statement), commentary (not foreclosing such a possibility, but stating that such situations would be "extremely rare"); Pet. App. 59a n.31. But a court may not combine three impermissible departure grounds to form one permissible one. In this context, three times

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[13] Petitioner Koon gains no assistance (Br. 47) from *Witte* v. *United States*, 115 S. Ct. 2199 (1995). In *Witte*, the Court indicated that a district court would have authority to consider a downward departure from the applicable sentencing range if the conduct underlying the offense of conviction had previously been taken into account in sentencing the defendant for a prior offense. *Id.* at 2209. Petitioners, however, have not been convicted twice, or sentenced twice based on the same conduct, and the *state* court acquittal hardly diminishes Koon's "culpability and the severity of the offense" (Br. 46) of which he was convicted in *federal* court.

zero equals zero. Any other view would create a gaping loophole in the Guidelines. Every defendant is unique, and each crime carries with it a constellation of events that single it out from all other crimes. If a district court could permissibly cumulate these factors to explain why a particular criminal defendant deserved a sentence outside the Guidelines, the Guidelines system would rapidly unravel. See *United States* v. *Minicone*, 26 F.3d 297, 301-302 (2d Cir. 1994) (collecting cases), cert. denied, 115 S. Ct. 344 (1994).

B. The District Court Erred In Granting A Downward Departure For Victim Misconduct

Section 5K2.10 (policy statement) of the Guidelines authorizes a district court to reduce a sentence below the guidelines range "[i]f the victim's wrongful conduct contributed significantly to provoking the offense behavior[.]" For two reasons, this Section does not authorize a downward departure here.

1. First, the district court found that King's unlawful conduct provoked only the initial use of force, not the offense behavior. It found that "by the time [petitioners'] conduct crossed the line to unlawfulness, Mr. King was no longer resisting arrest. He posed no objective threat, and the defendants had no reasonable perception of danger." Pet. App. 123a. The district court nonetheless concluded that Guidelines § 5K2.10 was applicable because, but for King's speeding, petitioners would never have been present at the scene, and but for King's initial wrongful conduct in resisting arrest and attempting to escape, no force would have been necessary, and the incident would not have occurred at all. Pet. App. 122a-123a.

The question whether Guidelines § 5K2.10 permits reliance on but-for causation is one of law, and the court of appeals correctly concluded that it does not. Pet. App. 71a. For that Section to apply, it is not enough that a victim's wrongful conduct sets in motion a series of events that eventually results in unlawful behavior committed for other reasons. Rather, the wrongful conduct must actually "provoke[] the offense behavior," *i.e.*, it must be a significant motivating factor for the use of unlawful force. There was no such finding here.

2. Second, the district court erred in departing on the basis of Guidelines § 5K2.10 because "[o]rdinary" victim misconduct does not fall outside the "heartland" of the excessive force guideline, Guideline § 2H1.4. In formulating the constitutional test for evaluating excessive force claims, this Court has expressly stated that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989). As the court of appeals explained, "[t]he incorporation of this consideration into the basic fabric of the law in this area strongly suggests that provocation by the victim in a situation where an officer must act quickly is typical—not unusual." Pet. App. 73a. Reported cases reinforce the conclusion suggested by *Graham*—victim misconduct occurs in many excessive force cases, and is therefore within the heartland of that offense.[14]

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[14] See *United States* v. *Reese*, 2 F.3d 870, 874-875 (9th Cir. 1993) (victim fled from police and officer was injured in incident), cert. denied, 114 S. Ct. 928 (1994); *id.* at 876 (victim led police on chase; police car crashed, injuring officer); *United States* v. *Boyland*, 979 F.2d 851

The willfulness requirement in a Section 242 prosecution further undermines any basis for departing downward on the basis of ordinary victim misconduct. To satisfy that element of the offense, the government was required to show that petitioners "*willfully* came down on the wrong side of the *Graham* standard." Pet. App. 73a. However reasonable the initial use of force on King might have been, it did not mitigate petitioners' subsequent willfully unlawful decision to beat him as he lay prone on the ground.

(6th Cir. 1992), cert. denied, 113 S. Ct. 3003 (1993) (Table) (victim led officers on car chase, then ran from officers; when caught, he resisted arrest), cert. denied, 113 S. Ct. 3003 (1993); *United States* v. *Newman*, 982 F.2d 665, 667 (1st Cir. 1992) (victim threw a toilet through cell bars, resisted placement in new cell, and would not stop screaming and yelling), cert. denied, 114 S. Ct. 59 (1993); *United States* v. *Myers*, 972 F.2d 1566, 1569 (11th Cir. 1992) (victim drove under the influence, resisted arrest, injured two officers, and destroyed jail property), *id.* at 1570 (victim yelled obscenities and challenged officers to fight); cert. denied, 113 S. Ct. 1813 (1993); *United States* v. *Messerlain*, 832 F.2d 778, 781-782 (3d Cir. 1987) (victim drove while intoxicated and parked car on highway; after he was arrested, he kicked out window of police car), cert. denied, 485 U.S. 988 (1988); *United States* v. *Bigham*, 812 F.2d 943, 944-945 (5th Cir. 1987) (victims escaped from prison); *United States* v. *Patterson*, 809 F.2d 244, 245 (5th Cir. 1987) (victim refused to obey command to go through intersection, then went through slowly while officer hung onto truck); *United States* v. *Walker*, 785 F.2d 1237, 1238 (5th Cir. 1986) (victim stopped for speeding; after heated exchange, victim struck officer); *United States* v. *DeCoito*, 764 F.2d 690, 692 (9th Cir. 1985) (victim knocked down officer with car and fled; when caught, he resisted arrest); *United States* v. *Fricke*, 684 F.2d 1126, 1127-1128 (5th Cir. 1982) (victim struck officer), cert. denied, 460 U.S. 1011 (1983); *United States* v. *Harrison*, 671 F.2d 1159, 1161 (8th Cir.) (victim leaped at officer), cert. denied, 459 U.S. 847 (1982); *United States* v. *Santos*, 588 F.2d 1300, 1301 (9th Cir.) (victims refused to return to jail cells and engaged in demonstration), cert. denied, 441 U.S. 906 (1979); *United States* v. *Stokes*, 506 F.2d 771, 773 (5th Cir. 1975) (victim threatened officers).

Petitioner Powell (Br. 37-39) contends that the relevant offense guideline is aggravated assault (§ 2A2.2) rather than the Section 242 guideline (§ 2H1.4), and that victim misconduct is outside the heartland of the range of cases included in the aggravated assault Guideline. But petitioners were convicted of willfully depriving or permitting others to deprive King of his constitutional rights, not of aggravated assault. Pet. App. 4a. Thus, the calculation of their sentences began with Guidelines § 2H1.4, which prescribes a base offense level of the higher of ten, or six plus the offense level applicable to the underlying offense. The Commission has explained that the addition of two levels "reflects the fact that the harm involved both the underlying conduct and activity intended to deprive a person of his civil rights," and that four more levels are added where the defendant is a public official "to reflect the likely damage to public confidence in the integrity and fairness of government, and the added likely force of the threat because of the official's involvement." U.S.S.G. Ch.2, Pt.H, Introductory commentary; see § 2H1.4, comment. (background). By so structuring the Guidelines, the Commission made it clear that a civil rights violation is both a different and a more serious offense than the underlying conduct by itself. The heartland, then, must be defined in terms of the civil rights offense, not the underlying offense of aggravated assault.

The district court concluded that a downward departure was necessary to distinguish cases in which an official's use of force is unlawful from the beginning from those in which an official's initial use of force is lawful, but a later use of force is not. The fact that there are more serious ways to violate Guidelines § 2H1.4, however, is insufficient to justify a departure in a "heartland" case. *United States* v. *LeBlanc*, 24 F.3d 340, 347

(1st Cir.), cert. denied 115 S. Ct. 250 (1994). When a heartland includes a range of conduct, some of which is more serious, the place within the range can reflect the gravity of the particular offense. That is generally the end of the analysis.

Of course, upward departure may be appropriate for those officers whose conduct is particularly heinous. See Guidelines § 5K2.8 (policy statement) (upward departure for extreme conduct). And, as the court of appeals recognized (Pet. App. 76a n.38), although ordinary victim misconduct does not warrant a departure in an excessive force case, unusual victim misconduct would be a candidate for departure. In this case, however, the district court's findings show that King engaged in ordinary, rather than unusual, misconduct. Pet. App. 70a. Notably, King did not attack or harm any officer. A downward departure for victim misconduct was unwarranted.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Sections 3553(a) and (b), 18 U.S.C., provide:

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the

guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

2. Sections 3742(a)-(f), 18 U.S.C., provide:

§ 3742. Review of a sentence

(a) Appeal by a defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline

range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea agreements.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for—

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) Decision and disposition.—If the court of appeals determines that the sentence—

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.